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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BARBARA O'NEAL,

Civil No. 09-722-AA
OPINION AND ORDER

Plaintiff,

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

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AIKEN, Chief Judge:

Claimant, Barbara O'Neal, brings this action pursuant to
the Social Security Act (the Act), 42 U.S.C. §§ 405(g) and

1 1383(c)(3), to obtain judicial review of a final decision of the
2 Commissioner denying her application for disability insurance
3 benefits (DIB) under Title II of the Act. For the reasons set
4 forth below, the Commissioner's decision is affirmed and this
5 case is dismissed.

6 **PROCEDURAL BACKGROUND**

7 Plaintiff applied for DIB on May 6, 2004, alleging an onset
8 of disability on June 15, 2002. Tr. 8. Plaintiff's application
9 was denied initially and upon reconsideration. On July 27, 2007,
10 plaintiff applied for and received a hearing with an
11 Administrative Law Judge (ALJ). Tr. 29. On August 15, 2007, the
12 ALJ denied her disability application. Tr. 39. On April 27,
13 2009, the Appeals Council denied plaintiff's request for review,
14 and the ALJ's decision was made final. Tr. 5.

15 **STATEMENT OF THE FACTS**

16 Plaintiff was born on August 30, 1964, and was 42 years old
17 on the day of the ALJ hearing. Tr. 79. Plaintiff has a high
18 school diploma. Tr. 33. She has past relevant work as a grocery
19 bagger, grocery delivery driver, and office clerical assistant.
20 Tr. 38. Plaintiff alleged disability since June 15, 2002, due to
21 rheumatoid arthritis, lumbar degenerative disc disease,
22 psoriasis, depression, and anxiety. Tr. 32, 73, 105.

23 **STANDARD OF REVIEW**

24 This court must affirm the Secretary's decision if it is
25 based on proper legal standards and the findings are supported by
26 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
27 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
28 mere scintilla. It means such relevant evidence as a reasonable

1 mind might accept as adequate to support a conclusion."

2 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
3 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).

4 The court must weigh "both the evidence that supports and
5 detracts from the Secretary's conclusion." Martinez v. Heckler,
6 807 F.2d 771, 772 (9th Cir. 1986).

7 The initial burden of proof rests upon the claimant to
8 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
9 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
10 an "inability to engage in any substantial gainful activity by
11 reason of any medically determinable physical or mental
12 impairment which can be expected . . . to last for a continuous
13 period of not less than 12 months. . . ." 42 U.S.C. §
14 423(d)(1)(A).

15 The Secretary has established a five-step sequential
16 process for determining whether a person is disabled. Bowen v.
17 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520,
18 416.920. First the Secretary determines whether a claimant is
19 engaged in "substantial gainful activity." If so, the claimant
20 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§
21 404.1520(b), 416.920(b).

22 In step two the Secretary determines whether the claimant
23 has a "medically severe impairment or combination of
24 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
25 §§ 404.1520(c), 416.920(c). If not, the claimant is not
26 disabled.

27 In step three the Secretary determines whether the
28 impairment meets or equals "one of a number of listed impairments

1 that the Secretary acknowledges are so severe as to preclude
2 substantial gainful activity." Id.; see 20 C.F.R. §§
3 404.1520(d), 416.920(d). If so, the claimant is conclusively
4 presumed disabled; if not, the Secretary proceeds to step four.
5 Yuckert, 482 U.S. at 141.

6 In step four the Secretary determines whether the claimant
7 can still perform "past relevant work." 20 C.F.R. §§
8 404.1520(e), 416.920(e). If the claimant can work, she is not
9 disabled. If she cannot perform past relevant work, the burden
10 shifts to the Secretary. In step five, the Secretary must
11 establish that the claimant can perform other work. Yuckert, 482
12 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e)-(g), 416.920(e)-(g).
13 If the Secretary meets this burden and proves that the claimant
14 is able to perform other work which exists in the national
15 economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

16 DISCUSSION

17 1. The ALJ's Findings

18 At Step One, the ALJ found that plaintiff did not engage in
19 substantial gainful activity after her alleged onset date, June
20 15, 2002. Tr. 31 At Step Two, the ALJ found plaintiff has the
21 following medically determinable severe impairments: rheumatoid
22 arthritis and lumbar degenerative disc disease. The ALJ found
23 plaintiff's other alleged impairments of psoriasis, depression,
24 and anxiety, were non-severe. Tr. 32-36. At Step Three, the ALJ
25 found plaintiff's severe impairments do not meet or equal the
26 requirements of a listed impairment. Tr. 36. The ALJ then
27 determined that plaintiff retained the residual functional
28 capacity (RFC) to perform the full range of light work, but she

1 is precluded from climbing ropes, ladders, and scaffolding. She
2 can do occasional bending, balancing, stooping, kneeling,
3 crouching, and crawling, but no frequent balancing. She should
4 avoid concentrated exposure to extreme heat, cold, wet/humidity,
5 fumes, dust, and gases. Tr. 36-38. At Step Four, the ALJ found
6 plaintiff retained the capacity to perform her past relevant work
7 as an office general assistant, and therefore, was not disabled.
8 Tr. 38-39.

9 2. Plaintiff's Allegations of Error

10 Plaintiff alleges the ALJ erred at step two based on his
11 consideration of the medical evidence. Specifically, plaintiff
12 objects to the ALJ's consideration of the medical opinions from
13 four physicians: Dr. Gregory Melby; Lawrence Lyon, Ph.D; Dr.
14 Gregory Lorts; and Dr. Peter Bonafede. Plaintiff argues that for
15 the period prior to June 2003, she "presented substantial
16 evidence from her doctors [of] mental impairments" and "provided
17 medical evidence of her psoriasis and resulting limitations."
18 Plaintiff's objections are based almost entirely upon medical
19 evidence outside the relevant time period, post-dating her date
20 last insured from at least 6 months and up to 4 years later.
21 Moreover, plaintiff's citations to the record often fail to
22 support her cited statement. Plaintiff asserts that for the
23 period prior to June 2003, she "presented substantial evidence
24 from her doctors [of] mental impairments" and "provided medical
25 evidence of her psoriasis and resulting limitations." (internal
26 citation omitted). The documents at those pages are dated March
27 23, 2004, and January 3, 2005. Neither document describes any
28 substantive limitation, nor do they indicate a severe impairment,

1 and they fail to address whether plaintiff in fact even had
2 psoriasis prior to June 30, 2003.

3 Plaintiff next argues that the ALJ "failed to discuss the
4 conclusions and treatment notes" of Drs. Lyon and Melby. I
5 disagree. The ALJ specifically noted Dr. Lyon's consultative
6 evaluation dated February 8, 2007, nearly 2 ½ years after
7 plaintiff's date last insured. Tr. 32, 433-38. The ALJ held,
8 "[b]ased on all the medical evidence of record," plaintiff's
9 alleged mental health impairments, through her date last insured,
10 resulted in mild limitations in Activities of Daily Living,
11 Social Functioning, and Maintaining Concentration, Persistence,
12 or Pace, and no episodes of decompensation. Tr. 32-33. The SSA
13 regulations and the Ninth Circuit holds that mild psychological
14 impairments are appropriately considered nonsevere. Saelee v.
15 Chater, 94 F.3d 520, 522 (9th Cir. 1996); and 20 C.F.R. §
16 404.1520a(d)(1). Plaintiff has failed to present any evidence of
17 severe mental impairment prior to June 30, 2003.

18 During the relevant time period, June 2002 through June
19 2003, plaintiff was treated at the Dalles Clinic by Dr. Robert
20 Mishra, and Erika Wilson, PA-C. Tr. 227-35. Plaintiff's first
21 report of depression was May 27, 2003, when Ms. Wilson noted
22 that, "[i]ncidentally, she mentioned that she has been depressed
23 about having chronic pain. . . and she answers positively to
24 suicidal ideation." Tr. 228. Ms. Wilson further noted that
25 plaintiff "has been treated with Zoloft in the past with an
26 excellent response, but she [discontinued taking the medication]
27 as she felt she was doing so well." Tr. 228. The record shows
28 that treatment with Zoloft was again successful. On August 13,

1 2003, plaintiff was noted to have an "excellent response" and
2 "near remission of depression symptoms" with Zoloft. Tr. 32,
3 226. Plaintiff then switched to Lexapro for insurance reasons,
4 however, by September 15, 2003, Ms. Wilson reported that
5 plaintiff had an "excellent response to Lexapro" and that
6 plaintiff felt her "depression has remitted." Tr. 32, 225. The
7 depression diagnosis was then dropped from plaintiff's diagnoses
8 in subsequent visits and by May 2004, plaintiff had again
9 discontinued her medication and her diagnoses was modified to
10 seasonal affective disorder. Tr. 32, 219-20, 221-25. Plaintiff
11 fails to meet her burden to show that she had a severe
12 impairment, or combination of impairments, which lasted or was
13 expected to last for a period of twelve months. 42 U.S.C. §
14 423(d)(1)(A). Plaintiff fails to present evidence of a severe
15 mental impairment prior to June 30, 2003.

16 Moreover, contrary to plaintiff's assertions, Dr. Melby did
17 not treat plaintiff during the relevant time period. Dr. Melby
18 first saw plaintiff on August 2, 2004. Tr. 372. The record does
19 not provide any material from Dr. Melby prior to the August 2,
20 2004 date. Therefore, Dr. Melby's diagnoses of depression and
21 anxiety, made on December 5, 2006, and May 2, 2007, respectively,
22 were three and four years after her date last insured. There can
23 be no dispute that none of these reports suggest plaintiff
24 suffered severe mental impairment prior to June 30, 2004, and
25 therefore, they fail to provide substantial evidence of mental
26 impairment. Also, because Dr. Melby did not treat plaintiff for
27 three years prior to his October 2004 disability letter, the ALJ
28 correctly found it conclusory and unsupported by any evidence.

1 In fact, Dr. Melby had seen plaintiff only twice prior to the
2 October 2004 disability opinion, with the second visit occurring
3 on the date of the letter. Similarly, the ALJ properly rejected
4 Dr. Melby's check-the-box report. I find the ALJ's Step Three
5 finding was supported by substantial evidence. Finally,
6 plaintiff asserts that she was assessed with depression in
7 November 2002, by Dr. Daniel Sager. Dr. Sager's progress note
8 actually lists "depression" as the fourth of five problems, and
9 he omits it completely from his "impressions," other than noting
10 plaintiff's tearfulness in the clinic that day. Tr. 579. Two
11 months later, on February 3, 2003, Dr. Sager again omits any
12 reference to depression as either a "problem" or "impression."
13 Tr. 574. I find that Dr. Sager's November 2002 reference to
14 depression, standing alone, fails to satisfy plaintiff's burden
15 of proving a severe mental impairment. Barnhart v. Walton, 535
16 U.S. 212, 217 (2002).

17 Plaintiff also asserts that the ALJ failed to consider the
18 medical evidence of Drs. Lorts and Bonafede. I disagree. The
19 ALJ specifically considered these opinions and properly found
20 there was no substantial evidence of psoriasis as a severe
21 impairment. Tr. 32, 35-36. Because the only suggestion of
22 psoriasis arises after plaintiff's date last insured, she fails
23 to prove psoriasis was a severe impairment during the relevant
24 time period.

25 The court fails to find merit in any of plaintiff's
26 remaining allegations of error. I find that the ALJ's decision
27 was supported by substantial evidence and that the ALJ applied
28 correct legal standards. 42 U.S.C. § 405(g); Tommasetti v.

1 Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008)(internal citation
2 omitted).

3 **CONCLUSION**

4 The Commissioner's decision is based on substantial
5 evidence, and is therefore, affirmed. This case is dismissed.
6 IT IS SO ORDERED.

7 Dated this 29 day of October 2010.
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12 Ann Aiken
13 United States District Judge
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